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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EJIKE UZOMAH, Defendant and Appellant.	B291138 (Los Angeles County Super. Ct. No. SA093911)

APPEAL from a judgment of the Superior Court of Los Angeles County, William L. Sadler, Judge. Affirmed.

Katharine Eileen Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David Madeo and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Ejike Uzomah appeals from a judgment of conviction for grand theft, contending the prosecutor committed prejudicial misconduct by making improper statements to the jury during closing argument. We conclude any error was harmless, and therefore affirm.

BACKGROUND

Hekatech Labor Company, based in Germany, purchased gas and water analyzers used for environmental purposes from Los Gatos Research (Los Gatos), based in the United States.

In June 2015, Uzomah, unaffiliated with either company, impersonated a Los Gatos employee and simulated its email address and invoice to induce Hekatech to wire $206,417 to the account of Sandra Featherston, Uzomah's unwitting girlfriend. Uzomah then persuaded Featherston to transfer most of the funds to himself in a flurry of small to moderate cash transactions over the next few days.

Los Gatos and Hekatech discovered the theft within two weeks and notified Hekatech's bank, which reversed the wire transfer, depleting Featherston's account. Over the next few days Featherston attempted to communicate with Uzomah via phone, text and email to discern what had happened, to no significant avail. His last communications with her were that "a mistake" had been made, and he was on his way back to London, where he sometimes resided. He advised her "Don't make hast[]y decisions," then disappeared from her life. The next time Featherston saw Uzomah was at his trial nearly two years later.

Featherston reported the theft to the El Segundo Police Department.

Trial was by jury. Uzomah's defense was that reasonable doubt existed as to whether Featherston had perpetrated the

theft with a third person named Henry. In support of the defense he adduced evidence that all communications pertaining to the financial transactions had been between Featherston and a "Henry." (Uzomah had told Featherston his first name was Henry.) Also in support of the defense Shalonda Ofoegbu, Uzomah's childhood friend, testified she had spent an evening with Uzomah and Featherston at a runway fashion event in Los Angeles a few years earlier, and found her to be domineering and controlling. Although Ofoegbu recalled several things Featherston had said and done that evening, she could not recall details about the event itself, for example the date or location of the event or name of the designer, and claimed no further information was available because she routinely deleted old texts and emails. Ofoegbu and a friend of hers also testified they saw Featherston a couple years later with a man she introduced as Henry.

Featherston denied ever having met Ofoegbu or her friend.

During closing argument the prosecutor made two comments Uzomah contends resulted in a miscarriage of justice.

First, the prosecutor stated: "Back in the day, what was the crime de rigueur, the guys are out there robbing banks, and, you know, they get 30 years to life for stealing $5,000 out of a bank out of the cash box, right, then they see guys dealing drugs pulling $20-, $30-, $40,000 in cash selling drugs. What do these guys get when they get arrested – they're getting 25 to life – they're getting five, they're getting ten, so people don't rob banks any more, people sell drugs. [¶] Now, people can pull $206,000, $300,000 from a computer at their home using identity theft and phishing, and they're getting two years' county jail if they're even getting caught. This is the crime that the sophisticated,

intelligent criminal turns to. This is the crime where you almost never get caught, you get ten times as much money, you don't have to be on the street corner, and it's easy. It's easy. You can do it at home. It's the work from home method . . . ."

A few moments later the trial court briefly interrupted the prosecutor's presentation and informed the jury, "Earlier, Mr. Engell made some comments about penalty or punishment. Ladies and gentlemen, that is not for your consideration, and it should be disregarded by you in its entirety."

Later in his opening, and then in closing arguments, when discussing the defense witnesses' recollection of purported meetings with Featherston the prosecutor stated that Uzomah had "sat down and explained [to the witnesses what they] needed to say." "[They] came in, called a couple of days beforehand, and asked him what they needed to testify to. . . . They don't know what this case is about. They don't know what the facts and circumstances are. . . . [¶] Yet they managed to find every single little thing that . . . Mr. Uzomah could use . . . ."

Uzomah moved for a mistrial based on the prosecutor's comments, but the trial court denied the motion on the ground that Uzomah's attorney had failed to object to them.

The jury deliberated for more than nine hours over the course of three days—at one point requesting a readback of testimony—before finding Uzomah guilty of grand theft. The trial court sentenced him to four years in county jail.

DISCUSSION

Uzomah contends the prosecutor's comments concerning the relatively light penalties imposed for phishing schemes, and Uzomah's coaching defense witnesses, resulted in a miscarriage of justice. He argues his trial counsel's failure to object to the

statements constituted ineffective assistance, preserving the objection on appeal.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "When a claim of misconduct is based on the prosecutor's comments before the jury . . . , ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citations.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) A defendant whose attorney fails timely to object may urge ineffective assistance on appeal "where there is no conceivable tactical purpose for counsel's actions." (*People v. Lopez* (2008) 42 Cal.4th 960, 972.)

We review a prosecutor's remarks " '[i]n the context of the whole argument and the instructions' " to determine whether "there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Here, Uzomah made no contemporaneous objection to either of the statements of which he now complains. Because no

basis exists in the record to conclude an objection would have been futile, the misconduct issue is forfeited.

Nor may Uzomah urge ineffective assistance on the ground that no conceivable tactical purpose existed for failing to object to the comments, because an obvious reason not to object to a relatively bland statement is to avoid drawing attention to it. (See *People v. Lopez*, *supra*, 42 Cal.4th at p. 972 [" 'Deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance' "].)

In any event, Uzomah's contentions fail on the merits.

A prosecutor may not invite a jury to consider a defendant's possible punishment during the guilt phase. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 157, fn. 4.)

Here, the prosecutor stated: "Now, people can pull $206,000, $300,000 from a computer at their home using identity theft and phishing, and they're getting two years' county jail if they're even getting caught. This is the crime that the sophisticated, intelligent criminal turns to. This is the crime where you almost never get caught, you get ten times as much money, you don't have to be on the street corner, and it's easy. It's easy. You can do it at home. It's the work from home method . . . ."

Assuming this somewhat opaque comment can be construed as an invitation to consider punishment, any error was undoubtedly harmless. The trial court almost immediately admonished the jury to disregard the remark, and twice instructed it not to consider punishment in rendering a verdict. "In the absence of any evidence of confusion on the part of the jury, '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the

court's instructions.' " (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083.) In light of this admonishment and instruction no reasonable likelihood exists that the jury applied the complained-of remark in an objectionable fashion.

Uzomah argues the lengthiness of deliberations—nine hours—and the jury's request for a readback suggest that a more favorable result would have been reached absent the improper argument. We disagree. Long jury deliberation and a request for a readback may suggest that the issue of guilt is not "open and shut" (*People v. Woodard* (1979) 23 Cal.3d 329, 341; see *People v. Williams* (1971) 22 Cal.App.3d 34, 39-40), but they do little to indicate where the sticking point is. Nothing about the length of deliberations or request for a readback here suggests the jury found it particularly difficult to exclude potential punishment from consideration.

In *People v. Woodard*, *supra*, upon which Uzomah relies, the "[i]dentity of the perpetrator was the central issue in appellant's trial," and the prosecutor improperly impeached a contra-identification witness by suggesting he "was such an unsavory character due to his prior convictions that his testimony should be disregarded." (23 Cal.3d at pp. 341-342.) In that context our Supreme Court noted that long jury deliberations suggest the jury struggled with the case's central issue, and therefore an improper statement by the prosecutor on that issue may have been prejudicial. (*Ibid.*) Here, the magnitude of the punishment to which Uzomah may have been exposed was a peripheral issue compared to the issue of Featherston's credibility. The length of deliberations does nothing to indicate the jury struggled with the lesser issue.

The prosecutor also commented on the credibility of Uzomah's defense witnesses, stating that Uzomah had "sat down and explained [to the witnesses what they] needed to say." "[They] came in, called a couple of days beforehand, and asked him what they needed to testify to. . . . They don't know what this case is about. They don't know what the facts and circumstances are. . . . [¶] Yet they managed to find every single little thing that . . . Mr. Uzomah could use . . . ."

A prosecutor is "permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on failure to produce logical evidence, [and] to argue on the basis of inference from the evidence that a defense is fabricated." (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) In *People v. Pinholster* the prosecutor referred to a defense witness as a "weasel," suggested another was a perjurer, and said a third was not "following the script" and had been caught in some lies, some "doozies." (*Pinholster,* at p. 948.) The Supreme Court held that this was permissible commentary.

But to refer to matter outside the record is misconduct. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 948.) Here, the prosecutor suggested that Uzomah and his defense witnesses conferred about their testimony before trial, a matter outside the record. That was improper. "The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Although we disapprove of the prosecutor's suggestion that such a meeting occurred, we conclude it did not so infect the trial with unfairness as to make Uzomah's conviction a denial of due process. Argument that testimony from Uzomah's defense witnesses was fabricated was supported by the witnesses' selective recall and from their relationships with and about Uzomah, so we do not see the prejudice required for reversal from the prosecutor's improper suggestion about how the testimony came to be fabricated.

DISPOSITION

The conviction is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.